INDEX

Page

PETITION FOR WRIT OF CERTIORARI

Opinion Below ---- 2
Jurisdiction ---- 2
Question Presented ---- 3
Point I ---- 3
Summary Statement of Matters Involved ---- 5
Reasons Relied Upon for Issuance of Writ ---- 6

1. The decision of the Circuit Court of Appeals is in conflict with a decision of this Court ---- 6
2. The decision of the Circuit Court of Appeals herein is in conflict with decisions from the Circuit Court of Appeals, Seventh Circuit 6
3. The decision of the Circuit Court of Appeals herein decides an important question of local law probably in conflict with applicable local decisions ---- 7
4. The decision of the Circuit Court of Appeals herein is probably untenable and therefore in conflict with the state law as yet unannounced by the Supreme Court of Oklahoma ---- 7

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Summary of Argument ---- 8

A. The question in the case ---- 9

B. The conflict between the decision of this Court in United Mut. Acc. Assn. vs. Barry, 33 L. Ed. 65, and the decision of the Circuit Court of Appeals herein ---- 9

Authorities Cited in Support Thereof:

United Mut. Acc. Assn. vs. Barry, 33 L. Ed. 65 ---- 9
Fidelity Mut. Life Ins. Co. vs. Powell, 74 Fed. 2d 525 ---- 9
Order of United Commercial Travelers vs. Sevier, 121 Fed 2d 651 ---- 9
Warbende vs. Prudential Insurance Company, 97 Fed. 2d 749, 117 A. L. R. 760 ---- 10

C. The conflict in the decisions from the Circuit Court of Appeals, Seventh Circuit, and the decision of the Circuit Court of Appeals herein ---- 11

Authorities Cited in Support Thereof:

Huss vs. Prudential Ins. Co. of America, 37 Supp. 364 (D. C. Pa.) ---- 11
Mutual Life Ins. Co. vs. Schenkat, 62 Fed. 2d 236 ---- 11
Warbende vs. Prudential Ins. Co., 97 Fed. 2d 749, 117 A. L. R. 760 ---- 11
Wiecking vs. Phoenix Mutual Life Ins. Co., 116 Fed. 2d 90 ---- 11

Page

D. The failure of the Circuit Court of Appeals to follow local law as manifested by the decisions from the Supreme Court of Oklahoma ---- 14

Authorities Cited in Support Thereof:

Continental Casualty Co. vs. Clark, 70 Okla. 187, 173 Pac. 453 ---- 14
Maryland Casualty Co. vs. Hazen, 182 Okla. 623, 79 Pac. 2d 577 ---- 14
Provident Life and Accident Ins. Co. vs. Green, 172 Okla. 591, 46 Pac. 2d 372 ---- 14
Provident Life and Accident Co. vs. Henson, 187 Okla. 150, 101 Pac. 2d 838 ---- 14
Woodmen of the World vs. Chapman, 189 Okla. 69, 113 Pac. 2d 600 ---- 14
Suggs vs. Mutual Ben. Health and Acc. Assn., 115 Fed. 2d 80 ---- 14
Ruhlin vs. New York Life Ins. Co., 82 L. Ed. 1290 ---- 14
West vs. American T. and T. Co., 85 L. Ed. 139 ---- 14
Huss vs. Prudential Ins. Co., supra ---- 14
Jackman vs. Equitable Life Ins. Soc., 145 Fed. 2d 945 ---- 14
Central State Life Ins. Co. vs. Jordan, 184 Okla. 239, 86 Pac. 2d 640 ---- 14
National Life Ins. Co. vs. May, 170 Okla. 198, 39 Pac. 2d 108 ---- 14
Barnett vs. Merchants' Life Ins. Co., 87 Okla. 42, 208 Pac. 271 ---- 15
Lincoln Health and Accident Insurance Company vs. Buckner, 117 Okla. 35, 245 Pac. 582 ---- 15
Lincoln Health and Accident Ins. Co. vs. Johnigan, 114 Okla. 223, 245 Pac. 837 ---- 15
Southern Surety Co. vs. MacMillan, 58 Fed. 2d 541, Tenth Circuit ---- 15
B. & H. Passmore Metal and Roofing Co. Inc. vs. New Amsterdam Casualty So., 147 Fed. 2d 536, Tenth Circuit ---- 15
Ruhlin vs. New York Life Ins. Co., 82 L. Ed. 1290 ---- 19

E. The failure of the Circuit Court of Appeals to follow the great weight of authority ---- 19

Authorities Cited in Support Thereof:

United Mutual Acc. Assn. vs. Barry, supra ---- 19
Wiecking vs. Phoenix Mutual Life Ins. Co., supra ---- 19
Mutual Life Ins. Co. vs. Schenkat, supra ---- 19
Warbende vs. Prudential Insurance Company, supra ---- 20
Huss vs. Prudential Life Ins. Co. of America, supra ---- 20
Anderzejewski vs. Prudential Ins. Co., 184 Atl. 51 ---- 20
Robinson vs. First National Life Ins. Co., 10 So. 2d 249 ---- 20
Simpson vs. Travelers Ins. Co., 121 Fed. 2d 683, Second Circuit ---- 20
Order of Commercial Travelers of America vs. Sevier, 121 Fed. 2d 651, Eighth Circuit ---- 20
Thompson vs. Loyal Protective Assn., 132 N. W. 556 (Mich.) ---- 20
Horsfall vs. Pacific Mut. Life Ins. Co., 72 Pac. 1028 (Wash.) ---- 20
Feis vs. U. S. Ins. Co., 201 N. W. 558 (Neb.) ---- 20
Hill vs. Great Northern Life Ins. Co., 57 Pac. 2d 405 (Wash.) ---- 20
Gasperino vs. Prudential Ins Co., 107 S. W. 2d 819 (Mo.) ---- 20
American National Ins. Co. vs. Fox, 184 S. W. 2d 937 ---- 20
Stinson vs. Edgemoor Iron Works, 53 Fed. Supp. 864 ---- 20
Horstein vs. Kramer Bros. Freight Lines, 133 Fed. 2d 143 ---- 20

Conclusion ---- 21

INDEX

Page

ALPHABETICAL LIST OF AUTHORITIES CITED

American National Ins. Co. vs. Fox, 184 S. W. 2d 937 20

Anderzejewski vs. Prudential Ins. Co., 184 Atl. 51 20

Barnett vs. Merchants' Life Ins. Co., 87 Okla. 42, 208 Pac. 271 15

B. & H. Passmore Metal and Roofing Co. Inc. vs. New Amsterdam Casualty So., 147 Fed. 2d 536, Tenth Circuit 15

Central State Life Ins. Co. vs. Jordan, 184 Okla. 239, 86 Pac. 2d 640 14

Continental Casualty Co. vs. Clark, 70 Okla. 187, 173 Pac. 453 14

Feis vs. U. S. Ins. Co., 201 N. W. 558 (Neb.) 20

Fidelity Mut. Life Ins. Co. vs. Powell, 74 Fed. 2d 525 9

Gasperino vs. Prudential Ins Co., 107 S. W. 2d 819 (Mo.) 20

Hill vs. Great Northern Life Ins. Co., 57 Pac. 2d 405 (Wash.) 20

Horsfall vs. Pacific Mut. Life Ins. Co., 72 Pac. 1028 (Wash.) 20

Horstein vs. Kramer Bros. Freight Lines, 133 Fed. 2d 143 20

Huss vs. Prudential Ins. Co. of America, 37 Supp. 364 (D. C. Pa.) 11

Jackman vs. Equitable Life Ins. Soc., 145 Fed. 2d 945 14

Lincoln Health and Accident Insurance Company vs. Buckner, 117 Okla. 35, 245 Pac. 582 15

Lincoln Health and Accident Ins. Co. vs. Johnigan, 114 Okla. 223, 245 Pac. 837 15

Maryland Casualty Co. vs. Hazen, 182 Okla. 623, 79 Pac. 2d 577 14

Mutual Life Ins. Co. vs. Schenkat, 62 Fed. 2d 236 11

National Life Ins. Co. vs. May, 170 Okla. 198, 39 Pac. 2d 108 14

Order of United Commercial Travelers vs. Sevier, 121 Fed. 2d 651 9

Provident Life and Accident Ins. Co. vs. Green, 172 Okla. 591, 46 Pac. 2d 372 14

Provident Life and Accident Co. vs. Henson, 187 Okla. 150, 101 Pac. 2d 838 14

Robinson vs. First National Life Ins. Co., 10 So. 2d 249 20

Ruhlin vs. New York Life Ins. Co., 82 L. Ed. 1290 14

Simpson vs. Travelers Ins Co., 121 Fed. 2d 683, Second Circuit 20

Southern Surety Co. vs. MacMillan, 58 Fed. 2d 541, Tenth Circuit 15

Stinson vs. Edgemoor Iron Works, 53 Fed. Supp. 864 20

Suggs vs. Mutual Ben. Health and Acc. Assn., 115 Fed. 2d 80 14

Thompson vs. Loyal Protective Assn., 132 N. W. 556 (Mich.) 20

United Mut. Acc. Assn. vs. Barry, 33 L. Ed. 65 9

Warbende vs. Prudential Insurance Company, 97 Fed. 2d 749, 117 A. L. R. 760 10

West vs. American T. and T. Co., 85 L. Ed. 139 14

Wiecking vs. Phoenix Mutual Life Ins. Co., 116 Fed. 2d 90 11

Woodmen of the World vs. Chapman, 189 Okla. 69, 113 Pac. 2d 600 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.———

BLANCHE STANFIELD,
Executrix of the Last Will and Testament of
Lloyd B. Stanfield, Deceased,
Petitioner,

vs.

THE PAUL REVERE LIFE INSURANCE COMPANY,
Worcester, Massachusetts, a Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

The petitioner, Blanche Stanfield, Executrix of the Last Will and Testament of Lloyd B. Stanfield, deceased, respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Tenth Circuit in that certain cause therein entitled "The Paul Revere

Life Insurance Company, Worcester, Massachusetts, a Corporation, Appellant, vs. Blanche Stanfield, Executrix of the Last Will and Testament of Lloyd B. Stanfield, Deceased, Appellee" being therein No. 3171. Said judgment was entered by said Circuit Court of Appeals on October 30, 1945 (R. 25). The decision is not unanimous but contains an independent and dissenting opinion (R. 28). A petition for rehearing was filed by this petitioner (R. 31). An order denying said petition for rehearing was entered November 28, 1945 (R. 38).

OPINION BELOW

The majority opinion of the Circuit Court of Appeals for the Tenth Circuit in this cause is set forth in full in the record on pages 25 to 28 inclusive, and the dissenting opinion of said Court is set forth in full in the record at pages 28 to 29.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended Act of Feb. 13, 1925, 43 Stat. 938, 28 USCA 347. This petition for writ of certiorari is filed within three months of the denial of petition for rehearing. (Nov. 28, 1945.) This application for writ is made pursuant to paragraph 5 (b) of rule 38 of the rules of this Court and in particular the part thereof which suggests that a writ of certiorari may be issued where a Circuit Court of Appeals has rendered a decision in conflict

with the decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided a federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The cause sought to be reviewed herein involves the decision of an important question in the law of life insurance and particularly a double indemnity rider attached to a life insurance policy providing for double indemnity in the event of accidental death.

QUESTION PRESENTED

Point 1

Does a life insurance policy containing a double indemnity rider reading as follows (R. 8):

> "If the death of the insured occurs while the attached policy is outstanding and in force under its original conditions and prior to the insured's sixty-fifth birthday, and results directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means, within ninety days of the occurrence of the accident, and if such accident (except in the case of accidental drowning or of internal injuries revealed by an autopsy) is evidenced by a visible contusion or wound on the exterior of the body, the

sum insured provided on the first page of the attached policy will be doubled,"

issued in Oklahoma to a resident of Oklahoma cover death admittedly from sunstroke where the evidences of bodily injury are the following (R. 17):

> "The sunstroke symptoms present were nausea, vomiting, there were some blood streaks in the material vomited, cyanotic condition of lips at first and body at time of death, retching, cold and clammy hand, dilated pupils of eyes, visible appearance of shock, excessive perspiration, cramping, poor pulse, and extreme pallor in face covered by profuse perspiration, which continued until death."

and (R. 11-12):

> "He looked funny all over and his shirt was wet with perspiration and his face was covered with perspiration. I helped him get in bed and felt of his hands and arms and they were sticky wet with perspiration and cold. He complained of pains in his arms and Mr. McMahon and I rubbed his arms with alcohol and then I bathed him off with cold water. His eyes were very peculiar looking. The pupils in his eyes were enlarged and his eyes were starry and glassy. His face was a pale yellow color and his lips were blue and looked swollen. He stayed in bed until about 5:00 o'clock. He complained of pain all afternoon and continued to perspire profusely. Soon after he came into the house he started vomiting and vomited almost continually until he died. Many times he was gasping for breath. Later on he complained of pain in his chest. About 6:00 o'clock my father and mother came out to the farm and my father took my husband to see the Doctor in Ardmore. I had gone to take some help home and when I got back to the house they had already left and I followed them in to Ardmore. When I got to the

home of my father and mother my husband was there in bed. They had some medicine Dr. Boadway had sent out. I gave him this medicine all night according to directions. Dr. Boadway came out about 9:00 o'clock the next morning and again about 11:00 o'clock. Lloyd never did get any better as far as I could tell. He kept on getting worse until a few minutes before two o'clock when he died. He vomited blood practically all of the time and continued to perspire freely. Some kind of fluid was coming out of nose which was hot. His face was the funniest color I ever saw and his lips were blue and purple. He continuously complained of pain in his arms and chest until he died. He vomited just a few seconds before he died about 2:00 o'clock on the afternoon of June 27th. His skin had turned blue practically all over his body. His hands were still just as cold and clammy as they were at first. His arms would draw up and he would clench his fists. His eyes never did clear up. They were starry and glassy and the pupils were enlarged and his eyes looked like they were sticking out of his head."

SUMMARY STATEMENT OF MATTERS INVOLVED

The facts in the case were stipulated (R. 7-18). The deceased, a strong, able-bodied man, while working in the field, suffered a sunstroke on June 26, 1944, near noon, which admittedly caused death on the next day about 2:00 P. M. There is no question about the validity of the policy or its provisions. As is set forth in the majority opinion (R. 25) death from sunstroke in the manner suffered by deceased, is death by accident suffered solely through external, violent and accidental means within the meaning of the double indemnity rider sued on under Oklahoma

law. The only question is whether or not such accident was "evidenced by a visible contusion or wound on the exterior of the body" (R. 25-6).

The District Court, following the cases from the Seventh Circuit Court of Appeals found for petitioner (R. 18). The Circuit Court of Appeals herein, recognizing the conflict between cases from the Circuit Court of Appeals, Seventh Circuit, the Federal District Court from Pennsylvania, and various state courts, and the Circuit Court of Appeals, Third Circuit and state courts, chose to follow the latter.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

The reasons relied on for issuance of writ, briefly stated, are:

1. The decision of the Circuit Court of Appeals is in conflict with this Court's decision in *United Mutual Acc. Assn.* vs. *Barry*, 33 L. Ed. 65.

2. The decision of the Circuit Court of Appeals is in conflict with the following cases from the Circuit Court of Appeals, Seventh Circuit: *Wiecking* vs. *Phoenix Mutual Life Ins. Co.*, 116 Fed. 2d 90; *Mutual Life Ins. Co.*, vs. *Schenkat*, 62 Fed. 2d 236, and *Warbende* vs. *Prudential Insurance Company*, 97 Fed. 2d 749, 117 A. L. R. 760.

It is also in conflict with *Huss* vs. *Prudential Ins. Co. of America*, 37 Supp. 364 (D. C. Pa.).

3. The decision of the Circuit Court of Appeals herein decides an important question of local law probably in conflict with applicable local decisions.

4. The decision of the Circuit Court of Appeals herein is probably untenable and therefore in conflict with the state law as yet unannounced by the Supreme Court of Oklahoma.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Tenth Circuit, requiring said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Court in the case therein numbered 3171 and entitled "The Paul Revere Life Insurance Company, Worcester, Massachusetts, a Corporation vs. Blanche Stanfield, Executrix of the Last Will and Testament of Lloyd B. Stanfield, deceased" to be reviewed and determined by this Honorable Court, as provided by law; that the judgment of said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to this Court may seem proper and just in the premises.

J. B. Moore,
Ardmore, Oklahoma,
Counsel for Petitioner.

Thos. W. Champion,
Louis A. Fischl,
Ardmore, Oklahoma,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.————

BLANCHE STANFIELD,
Executrix of the Last Will and Testament of
Lloyd B. Stanfield, Deceased,
Petitioner,

vs.

THE PAUL REVERE LIFE INSURANCE COMPANY,
Worcester, Massachusetts, a Corporation,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

A. The question in this case.

B. The conflict between the decision of this Court in *United Mutual Acc. Assn.* vs. *Barry,* supra, and the decision of the Circuit Court of Appeals herein.

C. The conflict in the decisions from the Circuit Court of Appeals, Seventh Circuit, and the decision of the Circuit Court of Appeals herein.

D. The failure of the Circuit Court of Appeals to follow local law as manifested by the decisions from the Supreme Court of Oklahoma.

E. The failure of the Circuit Court of Appeals to follow the great weight of authority.

ARGUMENT

A

The question in this case.

Under the policy provisions quoted under Point 1 (R. 8) and the stipulated facts with reference to evidences of injury there set out (R. 17, 11-12), which for the sake of brevity are not repeated here, was the death of petitioner's testate "evidenced by a visible contusion or wound on the exterior of the body of deceased."

B

The Conflict between the decision of this Court in United Mutual Acc. Assn. vs. Barry, 33 L. Ed. 65, and the decision of the Circuit Court of Appeals herein.

In the Barry case this Court considered a policy which provided that coverage should not extend "to any bodily injury of which there shall be no external and visible sign". Petitioner recognizes some difference in the verbiage here and in that case but submits that the purpose of such provisions in policies of this kind—to prevent fraud and mistake (*Fidelity Mut. Life Ins. Co.* vs. *Powell*, 74 Fed. 2d 525, Fourth Circuit; *Order of United Commercial Travelers* vs. *Sevier*, 121 Fed. 2d 651, Eighth Circuit) makes them comparable, and their meaning the same. In the Barry case this Court approved this instruction:

> "Visible signs of injury within the meaning of this certificate, are not to be confined to broken limbs

> or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury."

Petitioner respectfully submits that the decision of the Circuit Court herein is in conflict with this holding by this Court. As is pointed out under D hereof, the requirement of "a visible contusion or wound on the exterior of the body", when construed in connection with the other provisions of the rider, can in no real sense be held to exclude from the coverage of this policy death from internal injuries where such injuries were evidenced as in this case. The language of the Circuit Court of Appeals, Seventh Circuit, in *Warbende* vs. *Prudential Insurance Company*, supra, is particularly appropriate:

> "It is true that 'contusion,' etymologically considered, suggests an injury which is the result of the impact of a blow upon the exterior of the body. But for the purpose of our present inquiry the meaning cannot be so restricted. It is obvious that the purpose of requiring that there be a 'visible contusion or wound on the exterior of the body' is to have visible, physical evidence of the operation of the 'external, violent and accidental means,' which

are alleged to have affected the bodily injuries. In our opinion 'visible contusion,' as used in the policy, includes any morbid change in, or injury to, either the subcutaneous tissue, or the skin, which produces markings of discolorations, that are visible upon the exterior of the body. It is not material whether the 'visible contusion' results directly from the operation of the 'means' upon the exterior of the body, or indirectly from internal injuries which are affected by the action of the 'means.' 'The accidental operation of external means may be wholly internal,' and yet the internal injuries may extend to the subcutaneous tissue or into the layers of the skin. The visibility of the 'contusion' may be due to the discoloration either of the injured tissue under the skin, or of the injured skin itself, or of both."

C

The conflict in the decisions from the Circuit Court of Appeals, Seventh Circuit, and the decision of the Circuit Court of Appeals herein.

The decision herein is in conflict with the following cases from the Circuit Court of Appeals, Seventh Circuit: *Wiecking* vs. *Phoenix Mutual Life Ins. Co.*, 116 Fed. 2d 90; *Mutual Life Ins. Co.*, vs. *Schenkat*, 62 Fed. 2d 236 (called to the attention of the Circuit Court of Appeals); and *Warbende* vs. *Prudential Insurance Company*, 97 Fed. 2d 749, 117 A. L. R. 760. It is also in conflict with *Huss* vs. *Prudential Ins. Co. of America*, 37 Supp. 364 (D. C. Pa.). The Circuit Court of Appeals, Seventh Circuit, recognized this conflict in its opinion herein wherein it said:

"A number of courts have considered similar

provisos where the facts were substantially the same, and as in many such cases, have reached different conclusions. In *Wiecking v. Phoenix Mutual Life Ins. Co.*, 7 Cir., 116 F. 2d 90; *Huss* v. *Prudential Ins. Co., of America*, 37 F. Supp. 364; *American Nat. Ins. Co.* v. *Fox* (Tex.), 184 S. W. 2d 937, and *Warbende* v. *Prudential Ins. Co. of America*, 7 Circ. 97 F. 2d 749, the courts held that substantially the same facts met the requirements of similar provisos in the policies, while in *Paist* v. *Aetna Life Ins. Co.*, 54 F. 2d 393, affirmed Third Circuit, 60 F. 2d 476; *Pope* v. *Lincoln Natl. Life Ins. Co.*, 8 Cir., 103 F. 2d 265; *Dupee* v. *Travelers Ins. Co.* (N. Y.), 16 N. E. 2d 391, and *Travelers Ins. Co.* v. *Ansley* (Tenn.), 124 S. W. 2d 37, the courts held similar facts insufficient to meet the requirements in similar provisos."

The policy provisions in these cases were the same.

The Wiecking case from the Seventh Circuit was a sunstroke case. The Schenkat and Warbende cases poison cases. The Huss and Fox cases were sunstroke cases. The evidences of injury in those cases were much the same as here. In none of them did the deceased receive a blow, nor was he struck by any object nor was his skin torn or bruised. The same situation prevails here. There was evidence of injury sufficient to meet the requirements of the policies in the opinions of the Circuit Court of Appeals, Seventh Circuit, in three cases; Circuit Judge Clark writing the opinion in the Huss case; the Texas Civil Court of Appeals and the District Judge who tried this case. In each of these cases, and many others from other jurisdictions, the Courts in effect held that in order to sustain liability it was not neces-

sary to show that deceased had been struck by or had struck some object or that he had a bruise on his body received by coming into contact with some physical object or that his skin was torn by some impact. The Circuit Court of Appeals, Third Circuit, in the Paist case, and the New York court in the Dupee case, took the opposite view. We do not regard the Pope case from the Eighth Circuit as any authority for the reason there were no evidences of injury of any kind in that case; nor the Ansley case from Tennessee for the reason the Court there indicated that if the facts in that case had been as the facts in the Schenkat case from the Seventh Circuit a different result would have been reached. So, for the purposes of this brief, we have the conflict between the Seventh Circuit cases and the Pennsylvania District Court on the one hand and the Third Circuit and the Tenth Circuit on the other.

In none of the Federal Court decisions cited was the decision as respects the construction of the clause "visible contusion or wound on the exterior of the body" bottomed on local law. We therefore have an irreconcilable conflict between decisions from three Circuit Courts of Appeals which should be reconciled by this Court. In this connection petitioner believes it pertinent to point out that the policy provision under consideration appears in many accident policies now issued. It seems to be a standard provision with old line companies. This makes important the conflict between the Circuit Courts of Appeals and the reconciliation of this conflict by this Court.

D

The failure of the Circuit Court of Appeals to follow local law as manifested by the decisions from the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma has not directly passed on the question here. But in five cases, *Continental Casualty Co.* vs. *Clark,* 70 Okla. 187, 173 Pac. 453, *Maryland Casualty Co.* vs. *Hazen,* 182 Okla. 623, 79 Pac. 2d 577, *Provident Life and Accident Ins. Co.* vs. *Green,* 172 Okla. 591, 46 Pac. 2d 372, *Provident Life and Accident Co.* vs. *Henson,* 187 Okla. 150, 101 Pac. 2d 838, *Woodmen of the World* vs. *Chapman,* 189 Okla. 69, 113 Pac. 2d 600, that Court held sunstroke to be death by an accident effected solely through external, violent and accidental means within the meaning of the double indemnity rider sued on. The Circuit Court of Appeals, Tenth Circuit, recognized the rule in *Suggs* vs. *Mutual Ben. Health and Acc. Assn.,* 115 Fed. 2d 80, and in this case. There are other analogous cases from the Supreme Court of Oklahoma called to the attention of the Circuit Court of Appeals, which afford a reasonably satisfactory basis for conclusion by that and this Court respecting State law. *Ruhlin* vs. *New York Life Ins. Co.,* 82 L.Ed. 1290; *West* vs. *American T. and T. Co.,* 85 L. Ed. 139; *Huss* vs. *Prudential Ins. Co.,* supra; *Jackman* vs. *Equitable Life Ins. Soc.,* 145 Fed. 2d 945. The Oklahoma cases referred to are: *Central State Life Ins. Co.* vs. *Jordan,* 184 Okla. 239, 86 Pac. 2d 640; *National Life Ins. Co.* vs. *May,* 170 Okla. 198, 39

Pac. 2d 108; *Barnett* vs. *Merchants' Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271; *Lincoln Health and Accident Insurance Company* vs. *Buckner*, 117 Okla. 35, 245 Pac. 582; *Lincoln Health and Accident Ins. Co.* vs. *Johnigan*, 114 Okla. 223, 245 Pac. 837; *Southern Surety Co.* vs. *MacMillan*, 58 Fed. 2d 541, Tenth Circuit; *B. & H. Passmore Metal and Roofing Co., Inc.* vs. *New Amsterdam Casualty So.*, 147 Fed. 2d 536, Tenth Circuit.

See dissenting opinion herein (R. 28-9).

In this case death resulted from internal injuries which were evidenced on the exterior of the body. But the Circuit Court of Appeals concluded that such were not the kind of evidences of injury which the policy here requires. That Court construes the words "wound" and "contusion" to require breaking of the skin or a bruise from a blow received upon the body without the breaking of the skin. In either event, the injury would have to be received by violent contact of the body with some object or instrument or through breaking of the skin. Such an injury would of necessity be visible and be on the exterior of the body. This being true, petitioner feels it is inconsistent to say that the parties intended the words "wound" and "contusion" in this policy to mean a blow or injury received by violence or by breaking of the skin, and at the same time to require that such blow or injury be visible and be on the exterior of the body. Petitioner feels that the requirement that the wound or contusion be visible on the exterior of the body contra-

dicts the holding of the Circuit Court of Appeals that such wound or contusion must have been received by violence or breaking of the skin.

If the Circuit Court of Appeals' construction of the words "wound" and "contusion" is correct, then the words "visible" and "on the exterior of the body" are surplusage, and the policy ambiguous and uncertain. Inasmuch as this policy was written by the insurance company petitioner does not believe that it should be relieved of liability herein because it thusly worded the clause or phrase under which it seeks to escape liability.

Petitioner further submits that if the construction of the policy by the Circuit Court of Appeals is correct then the double indemnity rider sued on herein being ambiguous and uncertain, the rule of liberal construction which prevails in Oklahoma should be applied here and any doubt with respect to the intention of the parties in the making of the contract should be resolved in petitioner's favor.

The double indemnity rider insures against accidental death caused as therein set out where evidenced by a visible contusion or wound on the exterior of the body, except in case of drowning or internal injuries revealed by an autopsy. The requirement of a visible contusion or wound on the exterior of the body complements the requirement of an autopsy in the event of death from internal injuries which are not so evidenced. It is thus clear that protection is afforded in the event of death from internal injuries where

caused by a covered accident. Such being the case can it be said with reason that the parties intended the policy to cover death from internal injuries revealed by an autopsy but exclude such coverage where death is revealed to have been caused by internal injuries without an autopsy?

The purpose of the requirement that a contusion or wound be visible on the exterior of the body is not to restrict the coverage of the policy; not to provide coverage in the event of death from internal injuries revealed by an autopsy, but deny it in the event of death from internal injuries revealed without an autopsy; but to guard against fraud or mistake; to require an autopsy where the evidences of injury are not visible on the exterior of the body as here, but not to exclude from the coverage of the policy death from internal injuries evidenced by a visible contusion or wound on the exterior of the body, caused by such internal injuries, where the other provisions of the policy have been met.

In this case we have the following evidences of a visible contusion or wound on the exterior of the body of the deceased:

> "Cyanotic condition of lips at first and body at time of death; dilated pupils of eyes; visible appearance of shock; extreme pallor in face covered by profuse perspiration which continued until death, (R. 17); the pupils of his eyes were enlarged and they were starry and glassy; his face was pale yellow; his lips blue and swollen; his skin turned blue all over; his arms would draw up; his eyes looked like they were sticking out of his head, (R. 11-12)."

There were other evidences of the struggle of nature such as:

> "Vomiting; some blood streaks in material vomited; gasping for breath; fluid coming out of his nose; smother spells; retching; cold and clammy hands and he would clench his fists."

In the Fox case from Texas the Court makes the following interesting observations:

> "Technically speaking, a contusion is a bruise or damage which does not break the skin, and a wound involves a breaking of the skin. It is obvious that the policy could not reasonably insure against heat stroke, and at the same time require that the heat stroke be evidenced by a bruise of the kind made by a blow, or by an open wound, when those are not the usual evidences of a heat stroke. The kind of 'contusion' or 'wound' which the body must show in a heat stroke case naturally must be the kind of external evidence that would be produced by a heat stroke."

Petitioner submits that this is a logical and reasonable construction of the policy provision in question here. If this policy insures against death caused by sunstroke, and the Circuit Court of Appeals here held that it does, then the policy cannot reasonably require that such death be evidenced by injuries which a sunstroke could not produce. In this case death was evidenced by the kind of injuries which a sunstroke causes.

In the light of these observations and the cases from the Supreme Court of Oklahoma cited, the rules therein laid down and adhered to and the sustained position of that

Court in the construction of life insurance contracts, petitioner urges that it is manifest that the Supreme Court of Oklahoma would affirm the judgment in her favor.

This position being sustained, the decision of the Circuit Court of Appeals herein is probably in conflict with applicable local decisions. It is probably untenable and therefore in conflict with the State law as yet unannounced by the Supreme Court of Oklahoma. *Ruhlin* vs. *New York Life Ins. Co.*, 82 L. Ed. 1290. For these reasons it is respectfully submitted that the Circuit Court of Appeals erred wherein it held that there was an absence of any guidance from the Supreme Court of Oklahoma as to what it would hold in a case like this and with respect to the question here presented. Because of this error petitioner asks this Honorable Court to review the decision of the Circuit Court of Appeals.

E

The failure of the Circuit Court of Appeals to follow the great weight of authority.

Petitioner submits that the great weight of respectable authorities supports her position in this case and would affirm the judgment in her favor. She respectfully invites this Court's attention to the following cases:

United Mutual Acc. Assn. vs. *Barry*, supra;
Wiecking vs. *Phoenix Mutual Life Ins. Co.*, supra;
Mutual Life Ins. Co. vs. *Schenkat*, supra;

Warbende vs. *Prudential Insurance Company*, supra;

Huss vs. *Prudential Life Ins. Co. of America*, supra;

Anderzejewski vs. *Prudential Ins. Co.*, 184 Atl. 51;

Robinson vs. *First National Life Ins. Co.*, 10 So. 2d 249;

Simpson vs. *Travelers Ins Co.*, 121 Fed. 2d 683 (2d Cir.);

Order of Commercial Travelers of America vs. *Sevier*, 121 Fed. 2d 651 (8th Cir.);

Thompson vs. *Loyal Protective Assn.*, 132 N. W. 556 (Mich.);

Horsfall vs. *Pacific Mut. Life Ins. Co.*, 72 Pac. 1028 (Wash.);

Feis vs. *U. S. Ins. Co.*, 201 N. W. 558 (Neb.);

Hill vs. *Great Northern Life Ins Co.*, 57 Pac. 2d 405 (Wash.);

Gasperino vs. *Prudential Ins Co.* 107 S. W. 2d 819 (Mo.);

American National Ins. Co. vs. *Fox*, supra.

If petitioner's position under D be not sustained she earnestly insists that the Circuit Court erred in not following these cases and affirming her judgment. *Stinson* vs. *Edgemoor Iron Works*, 53 Fed. Supp. 864; *Hornstein* vs. *Kramer Bros. Freight Lines*, 133 Fed. 2d 143.

CONCLUSION

In conclusion petitioner respectfully submits that this Court should review the decision of the Circuit Court of Appeals, Tenth Circuit, herein for the following reasons:

1. Said decision is in conflict with an applicable decision of this Court;
2. Said decision is in conflict with decisions of the Circuit Court of Appeals, Seventh Circuit, on the same matter;
3. Said decision decides an important question of local law probably in conflict with applicable local decisions;
4. Said decision is probably untenable and therefore in conflict with the State law as yet unannounced by the Supreme Court of Oklahoma.

By reviewing this case this Court can reconcile the conflict between the decision of the Circuit Court of Appeals herein and the decision of this Court in the *Barry* case and the decision of the Circuit Court of Appeals in the *Wiecking*, *Schenkat* and *Warbende* cases, and the decision of the Pennsylvania District Court in the *Huss* case. Petitioner says she feels this should be done not only because she is probably entitled to have it done but also because there are outstanding many policies containing similar provisions and those policy holders are probably interested in having this Court settle the law which will apply to their policies in the absence of local law or manifestation thereof by the highest local court. Further, this Court can determine petitioner's claim that the Circuit Court of Appeals herein did not fol-

low local law as manifested by local decisions probably applicable and her further claim that the decision herein is probably untenable and therefore in conflict with the State law as yet unannounced by the highest local court; and petitioner's claim that the great weight of respectable authority supports her position herein and that the Circuit Court of Appeals erred in not following such authority, if there be no manifestation of local law.

Respectfully submitted,

J. B. Moore,
Ardmore, Oklahoma,
Counsel for Petitioner.

Thos. W. Champion,
Louis A. Fischl,
Ardmore, Oklahoma,
Of Counsel.

FILED
MAR 11 1946
CHARLES ELMORE CROPLEY
CLERK

In the
Supreme Court of the United States
October Term, 1945

No. 888

BLANCHE STANFIELD,
Executrix of the Last Will and Testament of
Lloyd B. Stanfield, Deceased,

Petitioner,

VERSUS

THE PAUL REVERE LIFE INSURANCE COMPANY,
Worcester, Massachusetts, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

D. I. JOHNSTON,
ROY C. LYTLE,
Oklahoma City, Oklahoma,
Counsel for Respondent.

KEATON, WELLS & JOHNSTON,
824 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Of Counsel.

MARCH, 1946.

KING LAW BRIEF CO., 418 N.W. Third, Oklahoma City—Phone 3-2969

INDEX

PAGE

Statement 1

Summary of Argument 2

Argument 2

A. The question in this case 2

Authority: —

Paragraph 5(b), Rule 38 of this Court 3

B. There is no conflict between the decision in United Mutual Accident Association v. Barry, 131 U. S. 100, 33 L. ed. 60, and the decision in the Circuit Court of Appeals herein 3

Authority: —

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 4

Landress v. Phoenix Mutual Life Ins. Co., 291 U. S. 491, 54 Sup. Ct. 461, 78 L. ed. 934 4

Opinion of the Circuit Court 3

Travelers Ins. Co. v. Ansley, 22 Tenn. App. 456, 124 S. W. (2d) 37 at 42 3

C. Conflict between decisions of various Circuit Courts of Appeals is inevitable when such courts are determining matters of local law where decisions of the state courts are controlling under the doctrine announced in Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 4

Authority: —

Huss v. Prudential Ins. Co. of America, 37 Fed. Supp. 364 5

PAGE

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290 ---- 5

Wiecking v. Phoenix Mutual Life Ins. Co., 116 Fed. (2d) 90 ---- 4

D. The Circuit Court of Appeals, Tenth Circuit, did not fail to follow the decisions of the Supreme Court of Oklahoma, there being admittedly no controlling case 5

Authority: —

Ansley v. Travelers Ins. Co., 173 S. W. (2d) 702 (Tenn.) 7

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 ---- 7

Fidelity Mutual Life Ins. Co. v. Powell, 74 Fed. (2d) 525 ---- 7

Opinion of the Court ---- 6

Travelers Ins. Co. v. Ansley, 124 S. W. (2d) 37 (Tenn.) 7

E. The Circuit Court of Appeals reached a just conclusion which is consonant with the weight of authority ---- 8

Authority: —

Ansley v. Travelers Ins. Co., 173 S. W. (2d) 702 (Tenn.) 10

Dupee v. Travelers Ins. Co. (N. Y.), 16 N. E. (2d) 391 9

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 ---- 9

Fidelity Mutual Life Ins. Co. v. Powell, 74 Fed. (2d) 525 ---- 10

Gasperino v. Prudential Ins. Co., (Mo.), 107 S. W. (2d) 819 ---- 9

Huss v. Prudential Ins. Co. of America, 37 Fed. Supp. 364 ---- 8

Opinion of the Court ---- 8

Paist v. Aetna Life Ins. Co., 54 Fed. (2d) 393, affirmed in 60 Fed. (2d) 476 ---- 9

Pope v. Lincoln National Life Ins. Co., 103 Fed. (2d) 265 ---- 10

State ex rel. Prudential Ins. Co. v. Shain, 127 S. W. (2d) 675 (Mo.) ---- 9

PAGE

Travelers Ins. Co. v. Ansley, 22 Tenn. App. 456, 124 S. W. (2d) 37 at 42 ---------- 9

Weicking v. Phoenix Mutual Life Ins. Co., 116 Fed. (2d) 90 ---------- 8

Conclusion ---------- 10

In the
Supreme Court of the United States
October Term, 1945

No.

BLANCHE STANFIELD,
Executrix of the Last Will and Testament of
Lloyd B. Stanfield, Deceased,

Petitioner,

VERSUS

THE PAUL REVERE LIFE INSURANCE COMPANY,
Worcester, Massachusetts, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to the permission granted by Paragraph 3 of Rule 38 of the rules of this Court, the respondent, The Paul Revere Life Insurance Company, files this brief in opposition to the brief heretofore filed by the petitioner in support of her petition for writ of certiorari.

SUMMARY OF ARGUMENT

A. Respondent agrees that the ultimate question to be determined is correctly stated by the petitioner, but does not agree that in this cause the petition for the writ should be granted.

B. There is no conflict between the decision in *United Mutual Accident Association* v. *Barry*, 131 U.S. 100, 33 L. ed. 60, and the decision in the Circuit Court of Appeals herein.

C. Conflict between decisions of various Circuit Courts of Appeals is inevitable when such courts are determining matters of local law where decisions of the state courts are controlling under the doctrine announced in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188.

D. The Circuit Court of Appeals, Tenth Circuit, did not fail to follow the decisions of the Supreme Court of Oklahoma, there being admittedly no controlling case.

E. The Circuit Court of Appeals reached a just conclusion which is consonant with the weight of authority.

ARGUMENT

A.

The question in this case.

Respondent agrees with the statement contained in petitioner's brief at Page 9 as being the ultimate question to be determined in this litigation. The respondent states, however, that none of the suggested reasons outlined in Para-

graph 5(b) of Rule 38 of this Court impel the granting of the petition for the writ. The question involved is the construction of language used in an insurance contract, which is purely a question of local law.

B.

There is no conflict between the decision in United Mutual Accident Association v. Barry, 131 U.S. 100, 33 L. ed. 60, and the decision in the Circuit Court of Appeals herein.

The facts in the *Barry* case decided by this Court in 1889 are quite different from the facts in the case at bar in that, although it involved a sunstroke, the policy required only that there be external and visible signs of injury, while in the case herein the policy required that there be a visible wound or contusion on the exterior of the body of the deceased. The distinction between the two cases is made in the opinion of the Circuit Court herein (at Page 27 of the Transcript), when the Court said:

> "They arose under provisions which required a visible mark or evidence of injury, or language meaning substantially that. Under such a proviso we would have no difficulty in concluding that there were visible marks and evidence of an injury. But this proviso requires a wound or contusion on the exterior of the body."

The *Barry* case is cited and is likewise distinguished in *Travelers Insurance Company* v. *Ansley*, 22 Tenn. App. 456, 124 S.W.(2d) 37. The Court said at Page 42:

> "In other words under the one provision any manifestation of the injury which can be properly classified

as a sign or mark thereof is sufficient to meet its requirements, whereas, under the other, the parties agree upon the kind of sign or mark, namely, a bruise or contusion that must exist on the exterior of the body before liability is incurred.

"In this view every external wound or contusion may be a sign or mark of an internal injury not otherwise apparent to the eye but we think it clear that every physical sign or mark of such an injury is not necessarily a wound or contusion as those words are commonly understood."

It is probably immaterial whether the decision of the Circuit Court of Appeals in this case is in conflict with the *Barry* case, because in the interim between the decisions in these two cases, this Court has announced the doctrine embodied in *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188. If, however, *Erie Railroad Company* v. *Tompkins* were not controlling, then the present decision in this case would be correct in any event, because of the opinion in *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U. S. 491, 54 Sup. Ct. 461, 78 L. ed. 934, which held that a sunstroke was not an accident.

C.

Conflict between decisions of various Circuit Courts of Appeals is inevitable when such courts are determining matters of local law where decisions of the state courts are controlling under the doctrine announced in Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188.

Respondent admits that the decision in this case is in conflict with the decision of *Wiecking* v. *Phoenix Mutual Life Ins.*

Co., 116 Fed.(2d) 90, and it is in conflict with the decision in *Huss* v. *Prudential Ins. Co. of America*, 37 Fed. Supp. 364. That conflict, however, is quite natural and must be expected so long as the Federal courts are required to follow decisions of the state courts on matters of local law, particularly when the opinions of state courts on the same question are by no means uniform. In the *Wiecking* case the Court specifically states that the only question before it was what was the Indiana law. In the *Huss* case, *supra*, the Court said in its opinion at Page 366:

> "Of course, in view of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188, 114 A.L.R. 1487, this is no longer a question of general commercial law, but must turn upon the Connecticut law."

There will be conflicts in the decisions by the same Circuit Court of Appeals when cases are appealed from district courts sitting in separate states where the decisions of the Supreme Courts of the two states differ on matters of local law. This Court has said in *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 82 L. ed. 1290:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to the permissible difference of opinion in the state courts."

D.

The Circuit Court of Appeals, Tenth Circuit, did not fail to follow the decisions of the Supreme Court of Oklahoma, there being admittedly no controlling case.

The Supreme Court of Oklahoma has not passed on a case involving an insurance policy with a provision com-

parable to that herein. This is admitted by petitioner in her brief at Page 14. It is true that in numerous cases the Supreme Court of Oklahoma has held that a sunstroke is an accidental death, but none of the policies involved in the cases cited in the petitioner's brief made the requirement that the accidental death be evidenced by a visible contusion or wound on the exterior of the body. The Circuit Court in its opinion, in the Transcript at Pages 25 and 26, states that a:

> "* * * sunstroke is an accident effected solely through external, violent and accidental means."

The Court then discusses the question of whether or not this particular type of accidental death is one that is covered by the policy. The opinion ends with the statement:

> "In the absence of any guidance from the Supreme Court of Oklahoma we choose to follow those decisions which hold manifestations such as outlined above insufficient to constitute a wound or contusion upon the exterior of the body."

Until the Supreme Court of Oklahoma decides a case involving the same or similar issue, we submit that it is idle to speculate upon what that Court would say. Counsel for petitioner think that under a similar set of facts, the Supreme Court of Oklahoma would decide in favor of the beneficiary. Counsel for the respondent disagree. It is submitted that where there is no controlling decision of a state court, the Federal court may render such judgment and may construe the provisions of an insurance policy as it may think just and proper. The petitioner seeks an extension of the doctrine

announced in *Erie Railroad Company* v. *Tompkins* to an extent that is unauthorized by any decision of which respondent's counsel have any knowledge. The petitioner would have the Federal court bound not only to follow prior decisions of the state court, but bound to follow speculation as to what the Supreme Court of Oklahoma would say if, as, and when the question is presented to it. It is submitted that none of the decisions of the Supreme Court of Oklahoma cited under Proposition D give any indication whatsoever of what the Supreme Court of Oklahoma would do under the facts in a similar case, because none of the cases cited refer to a policy of insurance which requires visible contusions or wounds on the exterior of the body.

At Page 16 of her brief, the petitioner takes the position that the language in the policy is ambiguous and uncertain. In *Fidelity Mutual Life Ins. Co.* v. *Powell,* 74 Fed.(2d) 525, there was involved an identical double indemnity rider. Judge Parker stated in his opinion that the language was as plain as any of which our English speech is capable. On Page 17, the petitioner says that the language used was only to guard against fraud and was not intended as an exclusion from the coverage of the policy. This position has been held untenable by the Tennessee Court of Appeals in *Travelers Insurance Company* v. *Ansley,* 124 S.W.(2d) 37; *Ansley* v. *Travelers Insurance Company,* 173 S.W.(2d) 702, and by the Fourth Circuit Court of Appeals in *Fidelity Mutual Life Ins. Co.* v. *Powell, supra.*

E.

The Circuit Court of Appeals reached a just conclusion which is consonant with the weight of authority.

If the Federal court on a matter of local law receives no guidance from the decisions of the applicable state court, respondent knows no rule which requires the Federal court to decide the matter in accordance with that hypothetical thing called "the weight of authority." In the present case the Tenth Circuit Court of Appeals said (Tr. 27):

> "The parties were free to make their own contract and it is our duty to give effect thereto. Where language is clear and unambiguous and has a well-defined meaning, the presumption must be that the parties used such words in their ordinary and well understood meaning. Courts are not justified in adopting strained or technical or unnatural definitions of words in order to swing the pendulum one way or the other."

Even the dissenting judge who voted to sustain "the trial court's prophecy of what course the Supreme Court of Oklahoma would follow," said:

> "I cannot agree to a reversal of the judgment simply because the authorities on the other side of the question appealed to me as more logical and just."

Assuming, however, that this Court is interested in the matter of weight of authority, respondent submits that the weight of authority sustains the judgment of the Circuit Court of Appeals herein. Of the cases listed at Pages 19 and 20 of the petitioner's brief, there are exactly two in point. These are the *Wiecking* case, *supra*, and the *Huss* case, *supra*. Both of these cases involve identical policies and involve death by

sunstroke, yet in neither of these cases was the Federal court free to follow its own opinion. Under *Erie Railroad Company* v. *Tompkins, supra,* they were required to follow, and in their opinions stated that they were following the state court decisions in Indiana and Connecticut, respectively. Each of the other cases cited by petitioner involves a death resulting from poisoning (or some cause other than sunstroke), or the language of the policy involved differed in a material respect from that herein.

It will be noted that at Page 20 petitioner has cited the case of *Gasperino* v. *Prudential Ins. Co.* (Mo.), 107 S.W.(2d) 819. In that case the court held:

> "Cracked lips of insured suffering from typhoid fever effected solely through violent, external, and accidental means, were a visible 'contusion' or 'wound' on the exterior of the body within requirement of double indemnity clause of life policy so as to warrant recovery thereon for death resulting from fever."

This opinion, however, was quashed by the Supreme Court of Missouri sitting *en banc* in the case of *State ex rel. Prudential Ins. Co.* v. *Shain,* 127 S.W.(2d) 675.

On the other hand it is submitted that the position taken by the Tenth Circuit Court of Appeals herein is sustained by *Paist* v. *Aetna Life Ins. Co.,* 54 Fed.(2d) 393, affirmed by the Third Circuit Court of Appeals in 60 Fed.(2d) 476; and *Dupee* v. *Travelers Ins. Co.* (N.Y.), 16 N.E.(2d) 391. If the Court cares to consider other cases involving similar policy provisions but where death resulted from some cause other than sunstroke, we suggest *Travelers Insurance Company* v.

Ansley, supra; Ansley v. *Travelers Insurance Company, supra; Fidelity Mutual Life Ins. Co.* v. *Powell, supra,* (Fourth Circuit); and *Pope* v. *Lincoln National Life Ins. Co.,* 103 Fed.(2d) 265 (Eighth Circuit).

CONCLUSION

In conclusion, the respondent respectfully submits that this case is not one which requires a review by the Supreme Court of the United States for the reason that it involves purely a non-Federal question of local law where eventually the Federal courts will be in as hopeless a conflict as that which exists between the decisions of the highest courts of the various states. It having been admitted that there is no controlling decision of the Supreme Court of Oklahoma, respondent believes that the Circuit Court of Appeals for the Tenth Circuit was entitled to its independent judgment as to the correct judgment to render.

Respectfully submitted,

D. I. JOHNSTON,
ROY C. LYTLE,
Oklahoma City, Oklahoma,
Counsel for Respondent.

KEATON, WELLS & JOHNSTON,
824 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Of Counsel.

MARCH, 1946.